

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIMBERLY ANN JOHNSON,

Plaintiff,

v.

ALBERTSONS, LLC,

Defendant.

No. 2:18-cv-001678-RAJ

DEFENDANT'S TRIAL BRIEF

I. INTRODUCTION

Defendant Albertsons, LLC (“Albertsons”) submits this Trial Brief to assist the Court regarding the applicable legal standards governing Plaintiff’s causes of action and the defenses that Albertsons intends to pursue related to those claims.

The Court has become familiar with the facts of this case through the parties’ recent motion practice. The facts relevant to this matter were already presented to the Court in Dkt Nos. 29 and 44. Thus, Albertsons will not restate those facts here.

II. ISSUES FOR TRIAL

A. Plaintiff’s Title VII Claims

1. Disparate treatment based on gender

To prevail on this claim, Plaintiff must prove by a preponderance of the evidence that her gender was a motivating factor in Albertsons’ decision to terminate her employment. *See* Ninth Circuit Model Civil Jury Instruction 10.3. More specifically, Plaintiff bears the burden of

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LANE POWELL PC
1420 FIFTH AVENUE, SUITE 4200
P.O. BOX 91302
SEATTLE, WA 98111-9402
206.223.7000 FAX: 206.223.7107

demonstrating that discriminatory intent played a role in Albertsons' termination decision. 42 U.S.C. § 2000e-2(m); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242(1989).

2. Retaliation for complaining about alleged gender discrimination

To prevail on this claim, Plaintiff must prove by a preponderance of the evidence that, but for her complaint about gender discrimination, her employment would not have been terminated. Plaintiff must establish: (1) she opposed an unlawful employment practice; (2) Albertsons took an adverse employment action; and (3) a causal connection existed between Plaintiff's protected activity and Albertsons' adverse employment action. *Leland v. City & County of San Francisco*, 576 F. Supp. 2d 1079, 1094 (N.D. Cal. 2008); *see also* Ninth Circuit Model Jury Instruction 10.8 and *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013).

B. Plaintiff's Claims under the Washington Law Against Discrimination

1. Disparate treatment based on gender

To prevail on this claim, Plaintiff must prove by a preponderance of the evidence that Albertsons took an adverse employment action against Plaintiff and her gender was a substantial factor in Albertsons' decision to take that adverse action. WPI 330.01. "Substantial factor" means a significant motivating factor in bringing about Albertsons' decision. "Substantial factor" does not mean the only factor or the main factor in the challenged act or decision. WPI 330.01.01.

2. Retaliation for complaining about alleged gender discrimination

To prevail on this claim, Plaintiff must prove by a preponderance of the evidence that: (1) she was opposing what she reasonably believed to be discrimination on the basis of gender; and (2) a substantial factor in the decision to terminate her employment was her opposition to what she reasonably believed to be discrimination. *See* WPI 330.05.

C. Albertsons' Position and Defenses

1. Legitimate, non-retaliatory reasons

All employment decisions regarding or affecting Plaintiff were based upon legitimate, non-discriminatory, non-retaliatory business reasons that were in no way related to Plaintiff's

gender or any alleged protected activity. *Bergene v. Salt River Project*, 272 F.3d 1136, 1140-41 (9th Cir. 2001).

2. Mixed Motive/Same Decision Defense

If Plaintiff prevails on her disparate treatment claim with a finding that discrimination was a motivating factor, then Albertsons asserts a mixed motive defense. Albertsons will prove by a preponderance of the evidence that it would have made the same decision even if it had not taken Plaintiff's gender into account. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002) (en banc), aff'd, 539 U.S. 90 (2003).

3. No Actual or Constructive Knowledge

Albertsons cannot be held liable for any alleged discrimination prior to Plaintiff's January 2018 complaint to Bob Miller because it had no actual or constructive knowledge about any discrimination prior to that complaint. "When an employer has promulgated an effective and comprehensive anti-harassment policy that is aggressively and thoroughly disseminated to its employees, an employee's failure to utilize the policy's grievance process will prevent constructive knowledge of such harassment from adhering to the employer." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1279 (11th Cir. 2002).

4. Mitigation of Damages Defense

Should an employee succeed on an employment discrimination claim, the employer bears the burden of establishing a mitigation affirmative defense by a preponderance of the evidence. The employer must establish that: (1) the Plaintiff failed to use reasonable efforts to mitigate damages; and (2) the amount by which damages would have been mitigated. Ninth Circuit Model Instruction 5.3. The effect of an employee's failure to mitigate damages is a reduction in back pay and/or front pay damages. *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1345-47 (9th Cir. 1987).

5. Good Faith Efforts

Should Plaintiff prevail on her claim of intentional discrimination, Albertsons will prove that it engaged in good faith efforts to prevent discrimination in the workplace and is therefore

not liable for punitive damages. *Kolstad v. American Dental Association*, 527 U.S. 526, 544-45 (1999). Albertsons had a written, formal anti-discrimination policy, and it will prove that it engaged in good faith efforts to implement the policy and comply with Title VII. *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 516 (9th Cir. 2000) (“[d]efendants may ... establish an affirmative defense to punitive damages liability when they have a bona fide policy against discrimination”).

6. After-Acquired Evidence Defense

Plaintiff’s damages are barred in whole or in part by the doctrine of after-acquired evidence. Albertsons will prove by a preponderance of the evidence that it would have made the same decision to discharge Plaintiff because she retained various documents belonging to Albertsons following her termination, and she forwarded emails from Albertsons’ email system to her own personal email address during her employment. These acts are terminable offenses under Albertsons’ Information Security and/or Confidentiality policies. Albertsons learned of these terminable offenses no later than the date of Plaintiff’s deposition, May 9, 2019. If Albertsons proves by a preponderance of the evidence that it would have discharged the Plaintiff because of this alleged misconduct, then any award of back pay should be limited to the date that Albertsons would have made the decision to discharge the Plaintiff as a result of the alleged misconduct. Ninth Circuit Model Instruction 10.16.

7. No Liability for Punitive Damages

Punitive damages are not available under Washington state law. *Dailey v. North Coast Life Insurance Co.*, 129 Wn.2d 572, 919 P.2d 589 (1996). Punitive damages are only available under Title VII if Plaintiff proves that Albertsons acted maliciously or with reckless indifference to her federally protected rights. *See* 42 U.S.C. § 1981a. 42 U.S.C. § 1981a(b)(1). Punitive damages in this case are limited to \$300,000. 42 U.S.C. § 1981a(b)(3). Plaintiff has no basis upon which to recover punitive damages. Neither Albertsons, nor any of its employees sufficiently high in its corporate hierarchy, committed any act with malice or reckless indifference to Plaintiff’s federal or state-protected rights.

1 **III. CONCLUSION**

2 The evidence will show that Plaintiff cannot establish a claim for either gender
3 discrimination or retaliation, and that judgment should be entered for Albertsons.

4 DATED: February 18, 2020

5 LANE POWELL PC

6
7 By s/ Sean D. Jackson

8 D. Michael Reilly, WSBA No. 14674

9 David G. Hosenpud, *pro hac vice*

10 Beth G. Joffe, WSBA No. 42782

11 Sean D. Jackson, WSBA No. 33615

12 1420 Fifth Avenue, Suite 4200

13 P.O. Box 91302

14 Seattle, WA 98111-9402

15 Telephone: 206.223.7000

16 Facsimile: 206.223.7107

17 Email: reillym@lanepowell.com

18 hosenpudd@lanepowell.com

19 joffeb@lanepowell.com

20 jacksons@lanepowell.com

21 Attorneys for Defendant Albertsons, LLC

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2020, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice. I hereby certify that the attached document was sent to the following CM/ECF participants:

Ms. Susan B. Mindenbergs
Mr. Jeffrey L. Needle
705 2nd Avenue, Suite 1050
Seattle, WA 98104
(206) 447-1523
susanmm@msn.com;
jneedlel@wolfenet.com;
lrlopez.paralegal@gmail.com;
christine.smlaw@gmail.com

Executed on the 18th day of February, 2020, at Seattle, Washington.

s/ Sean D. Jackson

Sean D. Jackson, WSBA No. 33615
Address: 1420 Fifth Avenue, Suite 4200
P.O. Box 91302
Seattle, WA 98111-9402
Telephone: 206.223.7000
Fax: 206.223.7107
E-mail: jacksons@lanepowell.com